



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

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Seattle, WA 98101-3123

WATER
DIVISION

MAY 09 2019

The Honorable Shannon Wheeler
Chairman
Nez Perce Tribe
P.O. Box 305
Lapwai, Idaho 83540

Re: Consultation on the EPA's Clean Water Act Decision Regarding Idaho's Site-Specific Criterion for Temperature in the Hells Canyon Reach of the Snake River

Dear Chairman Wheeler:

I would like to express our gratitude to you, the Nez Perce Tribal Council, and tribal staff for the opportunity to discuss the Idaho water quality standards submissions referenced above on April 23, 2019. My staff and I continue to be grateful to you and the tribal staff for taking time in your busy schedules to consult with the EPA. We appreciate the perspectives and questions raised by the Tribe regarding these Clean Water Act section 303(c) decisions before the EPA.

The purpose of this letter is to summarize what we heard during the April 23 formal government-to-government consultation meeting, as well as what we heard in separate coordination meetings between the EPA and tribal staff, and the next steps moving forward. The summary of what we heard and the EPA's follow-up actions are below.

Weakening Water Quality Standards and Lessening Protection for Cold Water Fish

Several members of the Council emphasized that what really matters are the actions on the ground that protect and improve water quality and that there appears to have been little to no effort to-date to require compliance with the currently more stringent water quality standards. The Tribe questioned how the EPA could expect more to happen with weaker water quality standards potentially in place. We discussed and acknowledged that implementation of actions to address water temperatures and water quality in general in Idaho's Snake River are of paramount importance to protecting cold water fish.

During the staff-level coordination calls and at the meeting, the Tribe highlighted concerns regarding the potential implications of the agency's proposed action on the FERC relicensing process for the Hells Canyon Dam Complex and the associated CWA section 401 water quality certifications by the states of Oregon and Idaho. The EPA provided background information during the meeting on the certification process and the status (to the best of our knowledge).

Consultation with Tribal Governments Prior to Final Agency Decisions

The Tribe raised an important point during the meeting that pursuant to Executive Order 13175 and the EPA's consultation policy, it is the Tribe's expectation that it has an opportunity to meaningfully engage with the EPA on a government-to-government basis prior to the agency making a final decision regarding Idaho's proposed site-specific criterion for temperature. The Tribe observed that the EPA had

already taken preliminary steps to approve Idaho's proposal in advance of the consultation with the Nez Perce Tribal Executive Committee by submitting a Biological Evaluation to NOAA and the USFWS on April 4 on the agency's proposed action.

The EPA acknowledged that the BE reflects a proposed approval of the site-specific criterion and includes an analysis of the potential effects to listed species and critical habitat areas based on a temperature of 14.5°C during the first two weeks of the spawning period for fall Chinook. While the Endangered Species Act section 7 process is underway, we committed to provide the BE to the Tribe and to consider input and any additional information provided by the Tribe on the BE prior to making a final CWA decision.

Concerns about the Information and Analysis in the Biological Evaluation

- The Tribe expressed concerns about the scope of the Biological Evaluation for the agency's pending action on the Idaho Hells Canyon SSC for temperature and whether it captured all potential effects and available information. Specifically, the Tribe questioned whether the EPA:
 - 1) reviewed all the existing fish studies carefully including their life cycles and exposures over time, and whether the new evidence exists that unambiguously supports a revised water quality criterion;
 - 2) considered how the SSC may narrow the diversity, and therefore acclimation ability, of fish species, especially the fall-run Chinook.
 - 3) considered how climate change is stressing the fish already and that a weakened water quality standard would compound the issues the fish are facing.
- The Tribe also shared that the current criterion of 13C should remain in place to protect the whole spawning season.

Follow-Up Actions

- The Tribe requested a copy of the final BE along with the transmittal cover letters to NOAA Fisheries and the U.S. Fish and Wildlife Service. The EPA forwarded the copies to the Tribe on April 24, 2019.
- At the Tribe's request, the EPA also shared a copy of the agency's recent approval action on Idaho's human health criteria.
- The EPA will continue to keep the Tribe updated of the progress of our CWA review, including the responses we receive from NOAA and the USFWS. On May 7, 2019, the EPA sent to the tribal staff two documents we received from the Services pertaining to the ESA consultation for the Hells Canyon SSC for temperature:
 1. Concurrence letter from the USFWS of the EPA's determination of not likely to adversely affect the bull trout and designated critical habitat. With the concurrence letter, ESA section 7 consultation with UFWS is concluded for the proposed action.
 2. Letter from NOAA deeming the BE sufficient to initiate formal ESA consultation. A biological opinion is anticipated on September 7, 2019, unless an extension is mutually agreed upon.
- We remain available to answer any questions you and your staff may have and provide additional information as they become available to us.

Thank you again for your time and interest in the EPA's CWA action, and more broadly for the Nez Perce Tribe's sustained engagement in water quality matters. If you would like more information, or have questions or concerns, please contact me at (206) 553-1855 or Hanh Shaw, the Standards and Assessment Section Manager, at (206) 553-0171 or shaw.hanh@epa.gov.

Sincerely,



Daniel D. Opalski
Director

Electronic cc: Dave Johnson, Fisheries Program Manager
Mike Lopez, Staff Attorney
Ken Clark, Natural Resources Program Director